

9-305A036



Norfolk Southern Corporation
Law Department
Three Commercial Place
Norfolk, Virginia 23510-2191

16590
RECEIVED NOV 1 1989

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INTERSTATE COMMERCE COMMISSION

Writer's Direct Dial Number

804/629-2818

October 31, 1989

Ms. Noreta McGee
Secretary
Interstate Commerce Commission
Washington, D.C. 20412

Dear Ms. McGee:

I enclose four original counterparts of the document described in paragraph (1) hereof for recordation pursuant to §11303 of Title 49 of the U.S. Code.

In accordance with 49 CFR Part 1177 covering the recordation of documents, I advise you as follows:

(1) The enclosed document is a Temporary Use Agreement dated as of November 1, 1989 between General Electric Company, 2901 East Lake Road, Erie, Pennsylvania 16531, Bailor, and Southern Railway Company, Three Commercial Place, Norfolk, Virginia 23510, Bailee.

(2) The enclosed document is a "primary document" under 49 CFR §1177.1.

(3) No cross-indexing of the enclosed document is requested.

(4) The enclosed document was executed to evidence the grant by the Bailor to the Bailee of a temporary right to the use of certain railroad equipment, being:

33 3,200 H.P. diesel-electric locomotives, bearing the Bailee's initials and road numbers 3522 through 3554, both inclusive, AAR designation B-B.

NOV 3 05 PM '89
RECORDATION UNIT

Each Unit will be marked in letters not less than one inch in height with the words:

OWNERSHIP SUBJECT TO A SECURITY
AGREEMENT FILED WITH THE
INTERSTATE COMMERCE COMMISSION

(5) The names and addresses of the parties to the enclosed document are shown in paragraph (1) hereof.

(6) After recordation, the six original counterparts of the enclosed document not required by the Commission for recordation should be returned to our messenger who delivered this letter.

(7) The recordation fee of \$15 is enclosed.

(8) A short summary of the enclosed document for index use follows:

This is a Temporary Use Agreement dated as of November 1, 1989, between General Electric Company, as Bailor, and Southern Railway Company, as Bailee, covering 33 diesel-electric locomotives bearing Bailee's initials and road numbers NW 3522 through NW 3554, both inclusive.

Please acknowledge receipt on the enclosed copy of this letter.

Very truly yours,



J. Gary Lane
Senior General Attorney

JGL/ks
Enclosures

Interstate Commerce Commission

Washington, D.C. 20423

11/1/89

OFFICE OF THE SECRETARY

J. Gary Lane
Senior General Atty.
Norfolk Southern Corp.
Three Commercial Place
Norfolk, VA. 23510-2191

Dear Sir:

The enclosed document(s) was recorded pursuant to the provisions of Section 11303 of the Interstate Commerce Act, 49 U.S.C. 11303, on 11/1/89 at 3:10pm, and assigned recordation number(s). 16590

Sincerely yours,



Noreta R. McGee
Secretary

Enclosure(s)

16590

RECORDATION NO. _____ FILED 1425

NOV 1 1989 -3 10 PM

INTERSTATE COMMERCE COMMISSION

TEMPORARY USER AGREEMENT

Dated as of November 1, 1989

between

GENERAL ELECTRIC COMPANY

and

SOUTHERN RAILWAY COMPANY

TEMPORARY USER AGREEMENT, dated as of November 1, 1989, between GENERAL ELECTRIC COMPANY, a New York corporation (the "Vendor"), and SOUTHERN RAILWAY COMPANY, a Virginia corporation (the "Railroad").

RECITALS

WHEREAS, Railroad desires to acquire 33 new Dash 8-32B 3,200 H.P. diesel electric locomotives as further described in Schedule A hereto, to bear Railroad's road numbers SOU 3522 through 3554, both inclusive, such locomotives being hereinafter collectively called the "Equipment"; and

WHEREAS, Railroad, by Purchase Order numbered RRE400 (the "Purchase Order"), has contracted with Vendor to build the Equipment; and

WHEREAS, the Vendor, under the terms of the Purchase Order, is to deliver the Equipment to Railroad at Bellevue, Ohio, freight charges, if any, prepaid and included in Vendor's invoice; and

WHEREAS, inasmuch as Railroad has not yet consummated financing arrangements ("Financing Arrangements") for the acquisition of the Equipment, it is not in a position to accept delivery of the Equipment at this time; and

WHEREAS, Railroad anticipates that the Financing Arrangements will be consummated on or before March 1, 1990, and Railroad, in order that it may take possession of and use the Equipment pending completion of the Financing Arrangements, has requested Vendor to grant Railroad temporary possession of and the right to use the Equipment pursuant to the terms of this Agreement; and

WHEREAS, Vendor is willing to grant such right to use the Equipment upon the terms and conditions hereinafter stated.

* * * * *

NOW, THEREFORE, in consideration of the mutual promises, covenants and agreements hereinafter set forth, the Vendor and the Railroad hereby agree as follows:

1. The Vendor will deliver the Equipment to the Railroad f.o.b. at the point or points and in accordance with the delivery schedule set forth in Schedule A hereto. The Vendor's obligation as to time of delivery is subject, however, to delays resulting from causes beyond the Vendor's reasonable control. Upon delivery of each unit of the Equipment to the Railroad, an authorized representative of the Railroad will execute and deliver to the Vendor a certificate of acceptance in the form of Schedule B hereto certifying, if such be the case, that such unit appears to have been built in accordance with the specifications therefor and acknowledging receipt of delivery thereof under this Agreement, whereupon the Railroad shall assume the responsibility and risk of loss with respect to such unit so accepted.

2. The rights of the Railroad hereunder in respect of each unit of the Equipment shall commence on the date of acceptance of such unit hereunder and end on March 1, 1990, or earlier as hereinafter provided. Title to the Equipment shall remain in the Vendor, and the Railroad's right and interest therein is and shall be solely that of possession, custody and use under this Agreement. The Railroad or any third party acquiring an interest in the Equipment by reason of the conditional sale, equipment trust or other financing of the purchase price of the Equipment by the Railroad shall not by virtue of this Agreement or the possession and use of the Equipment by the Railroad under or pursuant to this Agreement or of anything permitted to be done by the Railroad hereunder in respect of the Equipment, acquire any title to or ownership of the Equipment, or any unit thereof, and the title to or ownership of the Equipment shall remain solely in the Vendor. The terms of this Agreement shall automatically be superseded and canceled without further action by or notice to any party concerned as to each unit of the Equipment by the terms of any lease, conditional sale agreement or other equipment financing agreement at the earlier to occur at the time of the payment to the Vendor of the purchase price of such unit or the time of filing with the Interstate Commerce Commission of said lease, conditional sale or other equipment financing agreement covering such unit, except the terms of paragraphs 4 and 7 hereof (to the extent not covered as respects General Electric Company or any assignee of its rights hereunder by the Financing Arrangements) and except for the obligations of Railroad to pay any user fees which may accrue under subparagraph 3(b) hereof.

This "Temporary User Agreement" is a financial arrangement, under which Railroad will have custody, possession and use of the Equipment purchased from Vendor, and the risk of loss of the Equipment is on the Railroad. It is anticipated that the Railroad shall acquire beneficial ownership of the Equipment under the Financing Arrangements and at that time

shall be entitled, as between Railroad and Vendor, to the Modified Accelerated Cost Recovery System (MACRS) deduction under Section 168 of the Internal Revenue Code of 1986, and the Vendor shall not be entitled to such MACRS deduction.

3.(a) The initial unit price and initial total price of the Equipment are set forth in Schedule A hereto. At any time before the assignment by the Vendor of its rights under the Purchase Order and the payment therefor by an assignee of the Vendor's rights and thereunder in respect of any unit of the Equipment, such initial prices shall be subject to such increase or decrease as may be agreed to by the Vendor and the Railroad, and the term "purchase price" as used herein shall mean such initial prices as so increased or decreased. If the Vendor does not receive the purchase price of each unit of Equipment pursuant to the Financing Arrangements, the Railroad will be obligated to pay such purchase price pursuant to the Purchase Order.

(b) The Railroad agrees to pay to the Vendor a daily user fee equal to \$498 per unit of Equipment commencing on the date of acceptance of such unit by the Railroad hereunder and ending on the day immediately preceding the date of the payment to the Vendor of the purchase price of such unit under the Financing Arrangements or payment under the Purchase Order. Such user fees in respect of each unit of the Equipment shall be due and payable to the Vendor by voucher or wire transfer mailed or sent by the Railroad from Roanoke, Virginia, within 15 days after receipt of invoices therefor.

4. The Railroad agrees that it will permit no lien of any kind to attach to the Equipment and that it will pay promptly all taxes and assessments which may accrue or be imposed upon or in respect of the Equipment by reason of or in connection with the Railroad's possession, use or operation thereof under this Agreement. The Railroad's obligations contained in this paragraph 4 shall survive the termination of this Agreement.

5. The Railroad shall, at its own expense, keep and maintain the Equipment in good order and repair at all times. The Railroad shall pay to the Vendor the actual purchase price of each unit of the Equipment lost, destroyed or irreparably damaged during the term of this Agreement.

6. Prior to delivery of each unit of the Equipment to the Railroad, it will be numbered with the appropriate road number set forth in Schedule A hereto. In contemplation of subsequent delivery of the Equipment under the Financing Arrangements, the Railroad will, throughout the term of this Agreement, keep and maintain plainly, distinctly, permanently

and conspicuously marked in stencil on each side of each unit of the Equipment, in letters not less than one inch in height, the following legend:

OWNERSHIP SUBJECT TO A SECURITY AGREEMENT FILED
WITH THE INTERSTATE COMMERCE COMMISSION

The Railroad may also cause the Equipment to be lettered "Southern Railway Company," "Norfolk Southern" or in some other appropriate manner for convenience of identification of the interest of the Railroad therein.

7. The Railroad shall indemnify, protect and hold harmless the Vendor from and against all losses, damages, injuries, liabilities, claims and demands whatsoever, regardless of the cause thereof, and expenses in connection therewith, including counsel fees, arising out of retention by the Vendor of title to the Equipment or out of the possession, use and operation thereof by the Railroad during the period when title thereto remains in the Vendor. This covenant of indemnity shall continue in full force and effect notwithstanding the full payment of the purchase price of the Equipment and the conveyance of the Equipment or the termination of this Agreement in any manner whatsoever.

8. The Railroad will cause this Agreement, any assignment hereof, and any amendments or supplements hereto or thereto to be filed and recorded with the Interstate Commerce Commission and otherwise as may be required by law or reasonably requested by the Vendor for the purpose of protection of its title to the Equipment and its rights under this Agreement or for the purpose of carrying out the intention of this Agreement. If the Equipment is to be used upon lines of railroad in any jurisdiction outside the United States of America, the Railroad shall prior to such use, to the satisfaction of the Vendor, arrange for the filing, recording or deposit (or any similar action) of all instruments required or advisable to protect the interest of the Vendor in the Equipment in that jurisdiction.

9. Vendor's Warranty. Vendor warrants that the Equipment subject hereto shall be free from defects in material and workmanship under normal use and service during the term of this Agreement. If, during the term of this Agreement, any part of the Equipment fails to meet the foregoing warranty and Railroad so informs Vendor upon that failure, Vendor, after verification of the condition of the part and usage, shall make available to Railroad a replacement or repaired part. Railroad shall continue to provide at its expense the labor to remove defective parts and install repaired and replacement parts. If

the Vendor is required to make available any replacement or repaired parts for a unit of Equipment in accordance with this Section, it is understood that this shall not in any way affect or abate Railroad's obligation to pay user fees hereunder.

Notwithstanding the generality of the foregoing, Vendor's responsibility shall not extend to any parts normally consumed in operation (such as, but not limited to, filters and brake shoes), or defects or damage caused in whole or in part by failure to comply with its operating and maintenance recommendations, by reason of improper storage or application, by misuse, negligence, accident or improper maintenance, or by repairs or alterations not authorized or approved by Vendor.

This Section sets forth the exclusive remedies for claims based on defects in or failures of the Equipment during the term hereof, whether claim is in contract, warranty, tort (including negligence) or otherwise and however instituted. Upon the expiration of the warranty period all such liability shall terminate. The foregoing warranties are exclusive and in lieu of all other warranties, whether written, oral, implied or statutory. NO IMPLIED STATUTORY WARRANTY OF MERCHANTABILITY OR FITNESS FOR PARTICULAR PURPOSE SHALL APPLY.

10. Patents. Except in cases of designs, articles and materials specified by the Railroad and not manufactured by the Vendor, or manufactured by the Vendor to Railroad's design, the Vendor shall defend any suit or proceeding brought against the Railroad so far as based on a claim that any unit of Equipment or any part thereof, furnished under this Agreement constitutes an infringement of any patent of the United States, if notified promptly in writing and given authority, information and assistance (at the Vendor's expense) for the defense of same, and the Vendor shall pay all damages and costs awarded therein against the Railroad. In case said unit, or any part thereof, in such suit is held to constitute infringement and the use of said unit or part is enjoined, the Vendor shall, at its own expense, and at its option, either procure for the Railroad the right to continue using said unit or part; or replace same with non-infringing items; or modify it so that it becomes non-infringing; or take possession of said unit and cancel this Agreement with respect to such unit, effective as of the date on which the Equipment or part is held to constitute infringement in such suit, the Vendor to pay the reasonable cost of returning said unit to Vendor. The foregoing states the entire liability of the Vendor for patent infringement by said unit, or any part thereof during the term of this Agreement. It is understood that in the event the use of a unit is enjoined based on a claim of infringement covered by the provisions of this Section, Railroad's obligation to pay rent with respect to such unit shall abate until the use of the

unit no longer is enjoined or this Agreement is canceled with respect to such unit as provided above.

With respect to any articles or materials specified by the Railroad, and not manufactured by the Vendor, or manufactured by the Vendor to Railroad's designs, the Railroad shall defend any suit or proceeding brought against the Vendor so far as based on a claim that any such designs, articles or materials, or any part thereof, furnished under this Agreement constitutes an infringement of any patent of the United States, if notified promptly in writing and given authority, information and assistance (at the Railroad's expense) for the defense of same, and the Railroad shall pay all damages and costs awarded therein against the Vendor. In case said designs, articles or materials, or any part thereof, is held to constitute infringement, and the use thereof is enjoined, the Railroad shall, in respect of the Equipment, at its own expense, and at its option, procure for the Vendor the right to continue using or manufacturing said designs, articles and materials, or shall permit Vendor, at Railroad's expense, to modify such designs, articles and materials so as to become non-infringing. It is understood that, notwithstanding any suits or proceedings which may be brought against Vendor or Railroad based on a claim that any designs, articles or materials specified by Railroad constitute an infringement of any patent of the United States, Railroad's obligation to pay user fees with respect to such Unit shall continue for the term of this Agreement.

11. Liability of Vendor. Vendor's liability arising out of the furnishing of any unit of Equipment under this Agreement, or its use, whether the liability is based on contract, warranty, tort (including negligence) or otherwise, will in no case exceed the cost of correcting defects to the Equipment.

In no case, whether liability arises under breach of contract, warranty, tort (including negligence) or otherwise, will Vendor's liability include any special, incidental, indirect or consequential damages including, but not limited to, loss of revenue or profits, damages to freight, loss of use of any equipment, cost of capital, downtime costs, or claims of Railroad's customers for such damages.

The foregoing provisions shall not apply to claims of third parties (except Railroad's customers) for personal injury (including death) or property damage to the extent such injury or damage is directly caused by Vendor's negligence.

12. Default. If Railroad breaches or is in default of any material provision of this Agreement and such breach or default is not cured within fourteen (14) calendar days after

written notice specifying such breach or default has been given pursuant to the provisions of this Agreement, then Vendor, at its option, may, without prejudice to any other rights or remedies it may have under this Agreement, at law or in equity, do any one or more of the following:

(a) proceed by appropriate court action either at law or in equity, to enforce performance by the Railroad of the applicable covenants of this Agreement or to recover damages for the breach thereof;

(b) terminate this Agreement immediately, whereupon Railroad shall purchase the Equipment in accordance with the provisions hereof; but the Vendor shall, nevertheless, have the right to recover from the Railroad any and all amounts which under the terms of this Agreement may then be due and owing or which may become due and unpaid for the use of the Equipment (including, but not limited to, rentals accruing on the Equipment after the date of termination); and also to recover forthwith from Railroad amounts due pursuant to Section 12 (c) below;

(c) in the event Railroad fails to purchase the Equipment, Vendor may by its agents enter upon the premises of the Vendor or other premises where the Equipment may be and take possession of all or any such Equipment and thenceforth hold, possess and enjoy the same free from any right of Railroad, or its successors or assigns, to use the Equipment for any purposes whatsoever; and to sell and deliver the Equipment to others upon such terms as Vendor may see fit in its sole discretion, it being understood and agreed that Railroad shall be liable to Vendor for (i) an amount equal to any difference in the price paid by such other parties and the purchase price of the Equipment, plus (ii) an amount equal to all expenses incident to such sale, including but not limited to the expenses of withdrawing the Equipment from the service of the Railroad, providing for the care and custody of such Equipment, preparing such Equipment for sale, and selling the same. Railroad shall pay from time to time upon demand by Vendor the foregoing amounts.

The remedies and powers in this Agreement provided in favor of Vendor shall not be deemed exclusive, but shall be cumulative, and shall be in addition to all other remedies and powers in its favor existing at law or in equity and each and every remedy and power may be exercised from time to time and simultaneously and as often and in such order as may be deemed expedient by Vendor. Railroad hereby waives any mandatory

requirements of law, now or hereafter in effect, which might limit or modify any of the remedies herein provided, to the extent that such waiver is permitted by law. No delay or omission of Vendor in the exercise of any remedy or power, no granting of an extension of time for the making of any payment due hereunder or other indulgence and no exercise of any remedy or power shall impair any such remedy or power or the rights under this Agreement or shall constitute a waiver of any breach or default or an acquiescence therein. In the event that Vendor shall bring suit and be entitled to judgment hereunder, then Vendor shall be entitled to recover reasonable expenses, including attorneys' fees and the amount thereof shall be included in such judgment.

As used in this Section, a breach or default of a material provision of this Agreement shall include, but not be limited to, the following:

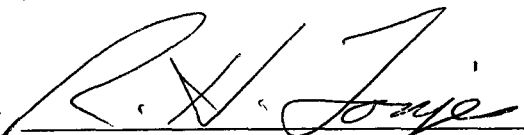
- (i) failure to pay any amounts hereunder when due;
- (ii) Railroad's making or suffering, voluntarily, by operation of law or otherwise, any unauthorized assignment, encumbrance or transfer of this Agreement or any interest therein or any right granted thereunder, and shall fail or refuse to cause such assignment, encumbrance or transfer to be canceled by agreement of all parties having any interest therein;
- (iii) any proceedings shall be commenced by or against Railroad for any relief under any bankruptcy or insolvency laws, or laws relating to the relief of debtors, readjustments of indebtedness, reorganizations, arrangements, compositions or extensions.

13. The terms of this Agreement and all rights and obligations hereunder shall be governed by the laws of the Commonwealth of Pennsylvania; provided, however, that the parties shall be entitled to all rights conferred by Section 11303 of the Interstate Commerce Act.

14. This Agreement, which is dated for convenience as of November 1, 1989, may be executed in any number of counterparts, each of which shall be deemed to be an original, and such counterparts together shall constitute a single instrument.

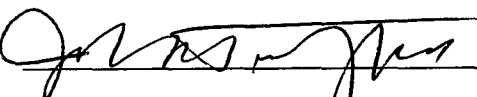
IN WITNESS WHEREOF, each of the parties hereto pursuant to due corporate authority, has caused this instrument to be duly executed in its corporate name by its officers, thereunto duly authorized, all as of the date first above written, and each of the undersigned signatories hereto declares pursuant to 28 U.S.C. 1746 under penalty of perjury that the foregoing is a true and correct document and was executed on the date indicated below its signature.

GENERAL ELECTRIC COMPANY

By 

Name: R. H. Tonjes
 Title: Manager Financial Operation
 Executed on October 27, 1989
 GE Transportation Systems

SOUTHERN RAILWAY COMPANY

By 

Name: John R. Turbyfill
 Title: Vice President - Finance
 Executed on October 30, 1989

SCHEDULE A
to
TEMPORARY USER AGREEMENT
Dated as of November 1, 1989
between
GENERAL ELECTRIC COMPANY
and
SOUTHERN RAILWAY COMPANY

<u>Type of Equipment</u>	<u>AAR Symbol</u>	<u>Plant</u>	<u>Quantity</u>
3,200 H.P. 8-32B Diesel Electric Locomotives	B-B	Erie, Pennsylvania	33

<u>Railroad Road Numbers (both inclusive)</u>	<u>Estimated Unit Price</u>	<u>Estimated Total Price</u>	<u>Delivery</u>
SOU 35 ² 5 2-3554	\$1,123,003	\$37,059,099	Erie, Pennsylvania in 1989

CERTIFICATE OF INSPECTION AND ACCEPTANCE

The undersigned, a duly authorized representative of Southern Railway Company (the "Railroad"), for the purpose of inspecting equipment that is to become subject to a Temporary Use Agreement dated November 1, 1989, between the Railroad and General Electric Company, (the "Equipment Agreement"), and which is ultimately to become subject to permanent financing arrangements of the Railroad, hereby certifies that the following described unit or units of railroad equipment (the "Equipment")

Description: Dash 8-32B 3,200 H.P. Diesel Electric Locomotives

Manufacturer: General Electric Company

Quantity:

Road Numbers: SOU

Delivered at: Erie, Pennsylvania

appear to be in good order and condition and to conform to the requirements and provisions of the Equipment Agreement, and have been delivered to and have been inspected and accepted on behalf of the Railroad pursuant to the Equipment Agreement as of the date indicated below.

The undersigned further certifies that there was plainly, distinctly, permanently and conspicuously marked in stencil on both sides of each unit of the Equipment the following legend, in letters not less than one inch in height:

OWNERSHIP SUBJECT TO A SECURITY AGREEMENT
FILED WITH THE INTERSTATE COMMERCE COMMISSION

Authorized Representative of
Norfolk and Western Railway Company

Dated: